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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 840.

BYRAM CONCRETANKS, INC.,
Petitioner,

vs.

WARREN CONCRETE PRODUCTS CO. OF N. J., WARREN CONCRETE TANK CO., INC., VINCENT DOTOLO, RICHARD DUNKLE, PATRICK E. HIGGINS, LEONARD J. FARMER, JOSEPH W. ROGERS, HULSE MOONEY, EDISON READ, JOHN W. KLEIN, FRANK M. BERRY, EDWARD C. STIERLI, JOHN EVERLY, E. BLAIR JOHNSON and BOARD OF HEALTH OF ROXBURY TOWNSHIP,
Respondents.

BRIEF FOR RESPONDENTS,

Patrick E. Higgins, Leonard J. Farmer, Joseph W. Rogers, Hulse Mooney, Edison Read, John W. Klein, Frank M. Berry, Edward C. Stierli, John Everly, E. Blair Johnson and Board of Health of Roxbury Township.

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Counter-statement of Questions Involved.

1. Did the Circuit Court of Appeals err in affirming a judgment of dismissal by the Trial Court where plaintiff's proofs and inferences thereon failed to show a prima facie violation of the Sherman and Clayton Acts?
2. Does the striking of irrelevant and oppressive discovery and the exclusion of objectionable testimony by the Trial Court and the subsequent affirmance thereof by the Circuit Court of Appeals constitute reversible error?

Counter-statement of the Case.

The 1950 Federal Census listed Roxbury Township's population at 5,707. This 22 square mile municipality situated in the northwestern hilly or mountainous section of New Jersey had neither a public water nor a public sewage system.

In 1951 the Township adopted an ordinance (Ex. P-16, R104b), hereinafter called the 1951 Ordinance, which generally related to standards for the installation of individual sewage disposal systems. Under Section 10 of the ordinance, the Board of Health was given power to grant special written permits for other forms of disposal installations as long as to do so was consistent with the other provisions of the ordinance.

By 1953, pre-cast concrete tanks appeared on the market and came to the attention of the Board of Health as a result of one John Grabovetz, a local developer, requesting permission to use this new type of septic tank in a housing development under construction within the municipality. This new type of pre-cast tank, at that time, was manufactured in Lancaster, Pennsylvania (525); and the Warren defendant was the only distributor of a pre-cast concrete septic tank in the area (617).

At a meeting of the Board of Health on March 19, 1953, the said John Grabovetz submitted a brochure of the pre-cast concrete tank, then known as the Keystone Tank, to

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LEGEND:

1. A page in the transcript of proceedings is cited by number only.
2. Pp designates the petition herein.
3. R....a refers to petitioner's appendix in the Court of Appeals.
4. R....b refers to the joint appendix of respondents in the Court of Appeals.

the Board. Under the authority of Section 10 of the 1953 Ordinance the Board adopted a motion which provided that "* * * Keystone brand of concrete septic tanks, as manufactured by the Warren Concrete Products Company, Warren Pennsylvania, or any concrete tank that equals or exceeds the quality of same, be approved for use by the Board * * *" (R390a).

At this point in the history of the case, the Board of Health was constituted under N. J. S. A. 26:3-9 (as amended L. 1938, c. 105, p. 225, sec. 1 and L. 1953, c. 349, p. 1919, sec. 5) which called for a Board of Health in Townships of not more than 20,000 to consist of the governing body, the township assessor and one physician to be appointed by the Township Committee. By virtue of this New Jersey Statute, defendants, Hulse Mooney, the then tax assessor, and Edison Read, then one of the Township Committeemen, were members of the Board of Health, with Mooney serving on the Board until February 1959 and Read until July 10, 1958. The physician and the other four members of the governing body who constituted the remaining 5/7ths of the board, at that time, were not made defendants in this suit.

The term of service of each member of the local Board who is a defendant herein is set forth in a chart at R145b of the joint appendix of respondents.

Defendant Patrick Higgins, the only Roxbury Township defendant and non-member of the Board, became an acting sanitary inspector for the Township in 1948. He obtained his license as a sanitary inspector second grade from the State of New Jersey in 1950 (R363a, R364a) and served in that capacity on a part-time basis until August 1, 1963.

On September 1st, 1954, "The Realty Improvement Sewage and Facilities Act" (1954), N. J. S. A. 58:11-23 et seq., was enacted by the State of New Jersey (hereinafter referred to as the 1954 Act). It was the apparent intention of this Act to protect the public health by the creation of minimum standards for the installation of sewerage systems, the demonstration to the local Board of Health that each system had been planned to comply with these minimum standards and finally that each installation actually did comply with such standards. The significant portions of the 1954 Act provided in part:

1. That no building permit for construction of a "realty improvement" could be issued by any municipal or other authority in the State nor construction begun until the local Board certified that the proposed water supply system and sewerage facilities complied with the provisions of the 1954 Act, the standards promulgated by the State Department of Health and such higher standards as are provided by local ordinance. (N. J. S. A. 58:11-25).

2. That where a local Board has an employee of the status of a licensed health officer, sanitary inspector first grade or a professional engineer, such personnel must certify to the Board that the application and accompanying engineering data relating to the proposed water system and sewerage facilities are in compliance with the Act and the standards; but if the Board has no personnel as described, it may issue certification if applicant files with the Board a certificate by a professional engineer stating that the proposed water supply system and sewerage facilities are in compliance with the Act and the standards. (N. J. S. A. 58:11-26).

3. For the promulgation of minimum standards for the installation of every "realty improvement" by the New Jersey State Commissioner of Health (N. J. S. A. 58:11-36).

4. For inspection of any particular installation, prior to covering the same from view, by the authorized representative of the local Board. (N. J. S. A. 58:11-33).

In Roxbury Township, the authorized representative for the inspection of installations, as required by the aforesaid section of the Act, was defendant Higgins. His duty was to make inspections of all installations including built in place units, metal tanks, precast concrete tanks and all other component parts of the system. This authority is by virtue of N. J. S. A. 26:3-19, 26:3-21 and 26:3-31(g).

On December 7, 1954, the New Jersey State Commissioner of Health promulgated, "Standards for the Construction of Sewerage Facilities for Realty Improvements" which served to supersede the 1951 Ordinance as amended.

It was after all of the above had transpired that in late 1954 Concrete Tanks, Inc., as plaintiff corporation was originally named, came into existence as a New Jersey corporation (358) with its principal place of business at the office of Frankel and Frankel, Esqs., 262 Main Street, Paterson, New Jersey. Its officers consist of Edmund Frankel, as President and principal stockholder, and Edmund's father, mother and brother (363-365).

It was not until 1955 that plaintiff commenced its operations in Mine Hill Township, New Jersey, a municipality adjacent to Roxbury Township (391). In its first year, it was operated by Edmund Frankel with one part-time

helper who worked two hours a day (R25b). That year plaintiff sold thirteen tanks (R32b) and its volume of sales increased to 226 tanks in 1959 (R31b, R32b).

The plaintiff together with other various manufacturers of pre-cast concrete tanks sold their tanks for installation in Roxbury Township (R101b); and according to Edmund Frankel (R43b), "quite a few" of plaintiff's tanks were sold and installed in Roxbury Township. Other plaintiff's products, including distribution boxes, seepage pits and septic tank covers, were also sold and installed in the Township (R38b-R39b).

Then in 1957, some individual defective septic tanks manufactured by plaintiff were individually rejected for installation in the municipality.

The first rejection occurred in 1957 on property owned by Elmer Dante. Albert Warga was the contractor for construction at the site. The sanitary inspector was notified to inspect the installation of the sewerage disposal system. Defendant Higgins, in making his inspection, determined that the Byram pre-cast concrete septic tank, a two piece coffin shaped tank, was cracked at the top. He refused to approve the installation (R101b).

In the fall of 1957, development of a subdivision tract known as Roxbury Hill was undertaken. The contractor for the individual sewage disposal systems for certain lots in the tract ordered some Byram pre-cast concrete septic tanks which were delivered to the site. Upon inspection, the Sanitary Inspector found that the Byram septic tanks were cracked and of poor quality. At least one was cracked lengthwise. The Sanitary Inspector then proceeded to con-

duct a water test in order to determine watertightness. Leakage clearly appeared. Thereafter, the Sanitary Inspector advised that he would not approve the use of the particular Byram units delivered to the site for installation and six of plaintiff's tanks were removed from the site (R95b-R98b).

A Byram pre-cast concrete tank was also rejected by the engineer who designed the job at the Horseshoe Milk Bar installation (R375a).

In the Spring of 1958 the Sanitary Inspector examined two tanks which were to be installed at the Merry Heart Nursing Home, Main Street, Succasunna. These tanks were two Byram units. Inspection of these units revealed that they were cracked in a manner similar to the Byram units previously delivered to the Roxbury Hill subdivision tract. The Sanitary Inspector advised the owner of the nursing home that he would not approve the use of those particular tanks because of their defective condition (R96b-R97b).

The above rejections constituted the total rejections of the plaintiff's products within the Township of Roxbury throughout these many years; and each rejection was made on an individual basis resulting from defective manufacturing or handling.

Out of these isolated instances the plaintiff began a series of activities and law suits as follows:

First, there was an exchange of letters from November 13, 1957 through December 10, 1957, between the law firm of Frankel and Frankel, representing plaintiff, and Higgins relating to the rejection of tanks and particularly the tank

supplied by plaintiff for the Dante job (Ex. P-15, R391a-R399a). In Higgins' letter to Frankel and Frankel of December 10, 1957 (Ex. P-15, 399a), Mr. Higgins directed Frankel and Frankel to write to defendant Rogers, as Chairman of Sanitation, Roxbury Board of Health. Other than a brief telephone call to Rogers by Leopold Frankel, there was no contact with the local Board. There was no attempt to obtain a hearing before the local Board. There was no action taken as provided under the *Revised Rules of the New Jersey Courts*, Rule 4:88, Procedure in Lieu of Prerogative Writs (R39b-R42b).

Then, in May of 1958, Byram Concretanks, Inc., instituted suit in the Superior Court of New Jersey, Passaic County, Chancery Division, Docket No. C-1842-57 against Higgins, only.

After the institution of this state court action, the local Board met at a special meeting on May 13, 1958, and after determining that Higgins had acted in good faith under the Act, adopted a motion (hereinafter called the 1958 motion) (R404a-R405a), wherein recommendation was made to the Township Committee to provide for the defense of Higgins in the state court action.

Thereupon, the plaintiff amended its complaint in June, 1958 to also include the local Board, Farmer, Rogers, Mooney, Read, Klein and Berry, who were then six of the seven members of the local Board.

A second amended complaint was served in September 1958. All of the allegations of the original and amended complaint were contained in the second amended complaint (R128b). These complaints contained claims of fraud,

maliciousness, bad faith, harassment and vilification and sought to establish tortious interference with the business of the plaintiff in the installation of pre-cast concrete septic tanks in Roxbury Township. The complaints also challenged the validity of the 1951 Ordinance and 1953 motion.

Meanwhile, on December 18, 1958, the Roxbury Board of Health adopted an ordinance which reaffirmed the standards promulgated by the State Commissioner of Health pursuant to the 1954 Act. In Section III of this ordinance, the Board prescribed higher standards and established a procedure to facilitate application for certification by the Board as required by the 1954 Act (Ex. P-16, R108b).

In continuance of its course of action, the plaintiff next on April 21, 1959 sent a letter to the New Jersey State Commissioner of Health. The plaintiff characterized its letter as a "Specification of Charges against the Roxbury Board of Health" (R122b).

At about this period of time, the governing body of Roxbury Township by virtue of N. J. S. A. 26:3-9 and 26:3-3 (R86b) adopted an ordinance in January 1959 replacing the "governing body and tax assessor" form of Board with a "citizens Board", composed of four citizens of the municipality and one member of the governing body.

On February 19, 1959, in accordance with this ordinance, defendants, Edward G. Stierli, a pharmacist, John Everly, a bio-chemist, and E. Blair Johnson, maintenance head of the Township school system, came on the Board for the first time and were sworn as the first members of the "citizens Board" (R81b, 86b, 74b). Ten months later, on December 12, 1959 the plaintiff filed its complaint in

this cause against every defendant including Stierli, Johnson and Everly, as well as the Warren defendants.

March 15, 1960 was the date scheduled for the trial of the state court action. At that time, plaintiff refused to proceed with trial and Judge Elden Mills of the Morris County Court (the venue having been changed to Morris County on defendant's motion) dismissed the action with prejudice. No appeal was taken.

Plaintiff then, on July 13, 1960, filed a complaint with the Federal Trade Commission (R125b) charging that the various Roxbury Defendants aided the Warren Defendants in achieving a monopoly in Roxbury Township. The Federal Trade Commission on the basis of the facts developed after making its investigation advised the plaintiff that it contemplated no further action (R127b).

In November 1962, three years after the institution of this suit, the matter was finally moved for trial. The defendant members of the Board of Health, with the exception of Stierli who meanwhile had accepted a reappointment, were no longer serving on the Board either because their term had expired or because of occupational or other personal reasons.

The evidence revealed that not one of these defendants of the Board of Health, up to and including the institution of this suit, had met or knew any of the Warren defendants (R68b, R69b, R74b-77b, R80b, R87b, R88b, R89b, R90b, R102b).

Plaintiff's president, in the action sub judice testified (R42b, R43b, R172a, R173a) that the local Board defendants were included in this action and the state court action

because they "backed up" Higgins by passing the 1958 motion to provide for his defense, because the local Board passed the 1958 Ordinance and because plaintiff wanted to include "anybody who could possibly be involved".

ARGUMENT.

I.

Plaintiff's exceptions to the findings and conclusions of the several courts below are frivolous and unsupported by the record.

Taking a number of circumstances and occurrences in the Township of Roxbury, commencing in the year 1951 with the passage of an ordinance relating to individual sewerage disposal systems, and then rhetorically manipulating the attendant facts so as to suggest bribery, corruption and tortious interference with its business activities, plaintiff, however, after six years of litigation has been unable to produce one particle of evidence that might remotely suggest wrong-doing by these defendants in contravention of any federal laws or state laws. Despite its cliches that the "Roxbury market" was closed or that "plaintiff was denied the equal protection of the laws", the undisputable fact remains that plaintiff since its inception in late 1954 (358) has sold and installed "quite a few" of its septic tanks (R43b, R44b) in addition to selling and installing its other products in Roxbury Township (R38b-R39b).

Although plaintiff presents no grounds whatever to support its assertion that defendants realized "untaxed

income" the fallacy of this charge is most apparent in the statement of plaintiff's counsel to Judge Coolahan of the District Court in opposition to motions for dismissal at the conclusion of plaintiff's case on December 10, 1962, at which time, Mr. Leopold Frankel stated that, "three defendants * * * in my opinion * * * do not belong in this conspiracy because they were made members of the Board of Health merely for window dressing". The three defendants named were John H. Everly, Edward C. Stierli and E. Blair Johnson. When the Court replied, referring particularly to Johnson, that he was, nevertheless, made a defendant and charged with accepting bribes, counsel answered: "* * * I didn't know what this defendant had to do with it at that time. I could not know and therefore we had to make them all defendants. And, I say, sir, that if I have done these three people an injustice I certainly would like to make up for it" (1249-1250).

Similarly, although bribery was made an issue at trial, nonetheless, counsel admitted to the Court that plaintiff had no direct evidence that any officials were bribed (R16b-R17b).

Plaintiff, seemingly, would imply that the District Court refused to take cognizance of, and summarily dismissed, plaintiff's several causes of action. The record in this case, however, attests to the many days of trial, the production of numerous exhibits and nineteen witnesses, eleven of whom were the defendants, with the end result that the alleged causes of action remained glaringly naked of any proof that might factually support them. And, although the District Court, in its opinion, made reference to *Parker v. Brown*, 317 U. S. at page 341 (1943), Judge Coolahan

clearly stated that, "the prime motive for dismissing this action is the fact that the evidence was insufficient to show a combination or conspiracy in restraint of trade or a restraint or monopolization of trade or commerce under the Sherman and Clayton Acts (case cited). In fact, there has been no proof of any conspiracy whatsoever."

It is submitted that the trial court, in its opinion, cited the cases of *Klor's* v. *Broadway Hale Stores*, 359 U. S. 207 (1959) and *Radiant Burners* v. *Peoples Gas Co.*, 364 U. S. 656 (1961), for the proposition that the acts complained of must interfere with the natural flow of interstate commerce to prove violation of the anti-trust statutes; and that the Court did not make reference to these cases to support the concept that the complainant's commerce must be affected before a violation can be shown under the Sherman Act as the plaintiff would appear to contend in its brief at page 16.

Defendants do not dispute the law enunciated in the cases adduced by plaintiff on the subject of damages. Again, it is submitted, however, that plaintiff would appear to confuse the rule relating to the measure of proof needed to establish that it had in fact suffered some degree of damage which necessarily or proximately resulted from the wrongful acts complained of with the rule relating to the type of proof admissible on the question of ascertaining the amount or extent of such damage once the fact of damage has been shown. In the latter instance, although the proofs as to the extent or amount of damage need not be precise or certain, nonetheless, complainant is not relieved of the burden of first showing that the tort complained of had in fact occurred and that the violation did necessarily

result in at least some damage. *Bigelow* v. *R. K. O. Radio Pictures*, 327 U. S. 251, 264 (1946); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 562 (1931); *Eastman Kodak Co.* v. *Southern Photo Material Co.*, 273 U. S. 359 (1927).

In the case at hand, plaintiff would urge this Court to permit a jury to assess damages against these defendants solely on the basis of conjectures formed by an accountant (R360a-R361a) unsupported by any evidence whatsoever that because of the wrongful acts of these defendants, plaintiff did sustain a loss. That there must be a basis for the suppositions of the expert witness is firmly established in *Schwabe Inc.* v. *United Shoe Machinery Corp.*, 297 F. 2d 906, 909 (2d Cir. 1962); cert. denied, 369 U. S. 865 (1962).

II.

All proofs together with all favorable inferences reasonably drawn therefrom failed to create a fact issue.

Neither the testimony of the nineteen witnesses nor the numerous and varied exhibits introduced by plaintiff gave rise to any question that would be cognizable by a jury. The proofs, being undisputed, had shown that plaintiff had sold and installed its septic tanks in Roxbury Township (R43b), just as other manufacturers were able to sell and install their tanks in the municipality (R101b); that, as testified to by its president, Edmund Frankel, plaintiff had sold and installed quite a few tanks in Roxbury Township (R44b) as well as having sold and installed its other commodities (R38b, R39b); and that, the only disapprovals in

connection with the installation of plaintiff's products, since the commencement of its manufacturing operations in 1955, occurred on four separate occasions and involved a total of ten septic tanks, nine of which were individually rejected by the sanitary inspector Higgins, because of physical defects (R95b, R96b, R97b, R101b), and one of which was rejected by the engineer who designed the job for which the tank was ordered (R375a).

Moreover, the plaintiff has placed an unreasonable and an unwarranted construction on those portions of the record cited in its brief (R170a, R273a, Ex. P-3, R379a, R190a, R191a) to support its contention that a prima facie, "common design, purpose and understanding" was shown to exist between these defendants and the Warren defendants. The proofs unequivocally prescribe the antithesis of plaintiff's argument, as illustrated by the fact that none of the Roxbury defendants had ever met or had ever known of the Warren defendants prior to the institution of this suit (R68b, R69b, R77b, R80b, R87b, R88b, R89b, R90b, R102b). Thus, as a matter of law, there was no basis for submission of this case to the jury. Rule 50(a), *Fed. R. Civ. P.; Schad* v. *Twentieth Century Fox Corp.*, 136 F. (2d) 991, 996 (3rd Circ., 1943).

III.

The Court of Appeals did not base its determination on theories of collateral estoppel or res judicata and did not err.

The plaintiff urges this Court to grant certiorari on the proposition that the United States Circuit Court of Appeals in affirming the determination of the trial court dismissing plaintiff's complaint, did so as a result of an erroneous determination on its part that the Sherman Anti-Trust action brought in the Federal Court was barred by res judicata or collateral estoppel.

A plain reading of the opinion of the Circuit Court reveals that the first paragraph of the opinion is devoted to a brief history of the case wherein the court alluded to the prior action against some of the individual defendants in the Superior Court of New Jersey, while the second paragraph states, in part, that the basis of the Circuit Court's determination was that the District Court did not err in its conclusion that plaintiff failed to prove its case.

Since none of the defendants at any time urged a theory of res judicata or collateral estoppel to the Circuit Court and since the Circuit Court so obviously in the second paragraph of its opinion spells out precisely the basis for its determination, which basis has nothing to do with res judicata or collateral estoppel, it would seem that plaintiff's theory is fanciful and ill-founded and does not serve as a proper basis for certiorari.

IV.

The discovery rulings of the Trial Court were proper and followed established authority.

The plaintiff asks for certiorari in reference to the Roxbury defendants on the basis of the existence of an important question of discovery under Federal Rule 34 not settled by the United States Supreme Court.

The Circuit Court, unimpressed by plaintiff's discovery demands, characterized them as, "so lacking in merit as to require no discussion" (Pp35).

The discovery demanded by plaintiff against the Roxbury defendants poses no new Federal question, but simply demonstrates the well accepted principle that the Federal Courts under *Fed. R. Civ. P. 33* by reference to *Fed. R. Civ. P. 30(b)* will protect parties from annoyance, embarrassment and oppression.

Plaintiff's interrogatories (R25a-R28a) (R2b-R9b) required from each Board of Health defendant complete and exhaustive accountings of the defendants' financial positions as well as their families for the years 1955 through 1960.

With no evidence of conspiracy against any of the members of the Board of Health or Higgins, with an utter disregard of the fact that three of the Board of Health defendants did not become members of the Board until 1959 (R81b, R86b, R74b), that another defendant first became a member in 1958 (R330a, R331a), and that all of these members served for terms of ranging periods, plaintiff

desires to expose confidential and personal information which could not, in any way, serve to advance the determination of the case.

Edmund Frankel, President of plaintiff corporation, verbalized that the plaintiff's case was based on suspicion alone when he stated the reasons for the joining of the local board and the individual board members in this and the state action (R42b, R43b, R172a, R62b, R68a, R69a).

Further in approximately six years of litigation involving both the state and federal courts, the plaintiff came up with not one iota of evidence of conspiracy, dishonesty or bribe taking by these defendants.

In the case of *Waldron* v. *British Petroleum Co. Ltd.*, 4 F. R. Serv. 2nd 30(b) 23, Case 1 (D. C. S. D. N. Y. 1961), a private anti-trust case, the court held that even though summary judgment in favor of one defendant is not appropriate in view of the strict policy in force in the Second Circuit with respect to convocation of summary judgment procedure, the court would closely regulate the plaintiff's pre-trial discovery as to that defendant and would curtail the usual Federal rules permitting "fishing expeditions" when the plaintiff's case against the particular defendant is based on little more than suspicion and inference, as appeared from extensive pre-trial examination of plaintiffs conducted by the defendant.

Parties are therefore protected from invasion into their confidential affairs unless there is a clear showing of relevancy. *Zenith Radio Corp.* v. *R. C. A.* (D. Del. 1952), 106 F. Supp. 561, 17 F. R. Serv. 33.352, Case 1.

To otherwise justify plaintiff's position, the plaintiff argues that such inquiry was permitted in the cases of

Jelaza v. *U. S.*, 179 F. 2d 202 (4 C. C. A. 1950) and *Holland* v. *U. S.*, 348 U. S. 121 (1955). These cases cited are not authority for plaintiff's proposition as both actions were income tax evasion cases where the net worth formula was used to show that the defendants increase in net worth over a period of time was greater than income reported. The purpose for the use of this formula is to create the reasonable inference that the increase in net worth above an amount justified by reported income is derived from income that was not reported. In the case sub judice, a reasonable inference pointing to a conspiracy could not result from the discovery demanded. These requested probes can only lead to further burdensome, endless and fruitless invasions of an inquisitorial nature, a result abhorrent to the discovery procedures as well as to justice.

V.

The evidence rulings of the Trial Court were proper.

At the trial level the Court made various rulings on evidence which the Circuit Court held to be proper. Of this group, plaintiff has presented in Appendix "F" of its petition those rulings it now urges as a "departure of judicial proceedings" (Pp25).

A brief review of that portion relating to the Roxbury defendants reveal the trial court rulings to be correct.

1. Number 1 of plaintiff's Appendix "F" (Pp42): The trial court may in its discretion exclude matters so remote in time as to fail to be evidential. *Park Neponset Corp.* v. *Smith*, 258 F. 2nd 452 (1st Cir. 1958).

2. Number 2 of plaintiff's Appendix "F" (Pp42): The plaintiff failed to offer any evidence connecting P-11 with the Roxbury defendants. However, since P-11 was admitted into evidence and since the case was decided on defendants' motions to dismiss, there could not in any event be harmful error. (R125a) Fed. R. Civ. P. 61.

3. Number 3 of plaintiff's Appendix "F" (Pp42): Use of declarations made in depositions taken in the state court case were properly excluded from use against all of the defendants in this action as the parties and issues were different. *Fed. R. Civ. P.* 26d; *Hertz v. Graham*, 23 F. R. D. 17 (S. D. N. Y. 1958); *First National Bank in Greenwich* v. *National Airlines, et als.*, 22 F. R. D. 46 (S. D. N. Y. 1958); *Wolf* v. *United Air Lines*, 12 F. R. D. 1 (M. D. Pa. 1951); *United States* v. *Silliman*, 6 F. R. D. 262 (D. N. J. 1946).

4. Number 5 of plaintiff's Appendix "F" (Pp42): Testimony of an expert witness interpreting provisions of a statute is improper as it would constitute opinion evidence involving conclusions relating to the meaning of the statute. *Whitson* v. *Aurora Iron & Metal Co.*, 297 F. (2) 106 (C. C. A. 7th) 1941; *Manter* v. *Bay State York Company*, 159 F. Supp. 670 (U. S. D. C. Mass.) 1958; *Huff* v. *U. S.*, 273 F. (2) 56 (U. S. C. A. 5th Circ.) 1959.

5. Number 6 of plaintiff's Appendix "F" (Pp43): The plaintiff has not presented a question relating to the exclusion of evidence but rather objects to the court's refusal to consider the constitutionality of a municipal ordinance and appears not to urge this as a ground for the issuance of certiorari.

6. Numbers 7 and 20 of plaintiff's Appendix "F" (Pp42 and 45): It is inconceivable that an increase in Higgins' salary from $200.00 per year to $1800.00 per year, as alleged by plaintiff over the last twelve year period, or the fact that two of the defendants worked for Hercules Powder Company of New Jersey, could have any relevancy or materiality in this action.

7. Number 9 of plaintiff's Appendix "F" (Pp43): The actual question propounded of Higgins was improper as it called for a conclusion (1209). *Thatenhorst* v. *U. S.*, 119 F. (2) 567 (C. C. A. 10th Circ.) 1941; *Wigmore on Evidence*, 3rd Ed., Sec. 1970. The question, however, is moot as the witness did not know the Board's reaction.

8. Numbers 15, 16, 17, 18 and 19 of plaintiff's Appendix "F" (Pp44): Since there were no offers of proof in relation to the exclusion of testimony relating to alleged conflicts of interest, the purpose of the testimony is unknown and the questions therefore are not properly preserved for appeal. The general allegation that Rogers failed to fill out or certify forms, and that he and Curtis Williams prepared specifications for sewerage disposal systems, while acting as a member of the local board and township engineer, respectively, lacks any probative weight or value in terms of an attempt to prove a violation of the Sherman Act. *Parmalee Transportation Company* v. *Keeshin*, 292 F. (2) 794, Cert. Den. 368 U. S. 944 (1961), Reh. Den. 368 U. S. 964 (1962).

Consistently through its objections set forth in Appendix "F", plaintiff failed to make offers of what it expected to prove. Since the significance of the excluded evidence is less than obvious, an offer of proof was necessary to

preserve the questions. 5 Moore's Fed. Practice 2nd, 1351. *Hoffman* v. *Palmer*, 129 F. (2) 976, Aff'd on other grounds (1942), 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645, 144 A. L. R. 719; *Johnson* v. *Hill*, 274 F. (2) 110 (U. S. C. A. 8th Circ.) 1960.

Conclusion.

Petitioner having failed to show cause, it is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

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